docket -- was SWBT's abuse of the discovery process.[34] In that proceeding, the Texas arbitrators ruled "that SWBT had abused the discovery process in this proceeding on three separate and independent grounds: (1) by failing to produce requested documents, (2) by failing to provide witnesses who were knowledgeable about SWBT's activities on which they were filing testimony, and (3) by issuing the directive contained in ACI Exhibit 153 [which was filed under seal]."[35] On April 14, 1999, during the hearing on the merits, "it was discovered that SWBT had not produced certain documents in discovery." Sanctions Order at 5. The next day, "SWBT produced a redacted document labeled 'Southwestern Bell DSL Methods and Procedures,'" which

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[34] Counsel for SWBT has conceded that "[SWBT and Covad] had an arbitration scheduled for April [1999]. It was delayed, bifurcated because of a discovery problem admittedly." See 11/4/99 Open Mtg. Tr. at 237 (remarks of SWBT counsel Leahy). Mr. Leahy goes on to argue that this delay was cured by Covad's and Rhythms interim agreements with SWBT, which are discussed infra. See id.

[35] See Petition of Rhythms Links, Inc. for Arbitration to Establish an Interconnection Agreement with SWBT, Dkt. No. 20226, Order Ruling on ACI's and Covad's Motions and Amended Motion on Sanctions at 33 (Arb. PUCT Oct. 1999) (Order No. 20) ("Sanctions Order") (attached as Exhibit A to Goodpastor 10/27/99 Aff.).

While the contents of the referenced document, a January 14, 1999 email from Mari Quick to 81 SWBT and SWBT employees remain sealed, the email was sent after discovery commenced and "contained a directive regarding business matters of an administrative nature." Sanctions Order at 4, 10, 12. Moreover, the Arbitrators ruled inter alia that, to the extent the attorney-client privilege attached to ACI Exhibit 153, the crime/fraud exception pierced that privilege. See id. at 17.

discussed SWBT's xDSL processes and was directly responsive to multiple interrogatories propounded by Rhythms and Covad. Id. at 5 & n.8. At that point, "[b]ecause of the belated production of highly relevant documents and the consequent concern that SWBT had not been fully responsive to discovery requests, the Arbitrators ordered that discovery be extended for a period of six weeks to allow [Rhythms and Covad] an opportunity to conduct additional discovery." Id.

Fearing that the additional discovery would further delay their entry into the Texas xDSL market, Rhythms and Covad each requested an interim order requiring SWBT to interconnect with them. Rhythms Order at 3. The Arbitrators promptly issued an order to that effect on April 26, 1999. See id. at 3 & n.5 (citation omitted). Although SWBT subsequently appealed that order, the parties were able to agree to the terms of an interim agreement executed on June 2, 1999. Id. at 3. In the sanctions proceeding, SWBT attempted to argue that the existence of these interim agreements cured any harm or delay that resulted from its discovery abuses. Sanctions Order at 21-22. The Arbitrators disagreed. SWBT was fined nearly $850,000 in attorneys' fees, costs, and expenses.[36]

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[36] See Petition of Rhythms Links, Inc. for Arbitration to Establish an Interconnection Agreement with SWBT, Dkt. No. 20226, Order on Appeal of Order No. 20 (PUCT Oct. 1999) (attached as Exhibit B to Goodpastor 10/27/99 Aff.) (upholding sanctions imposed by Arbitrators and imposing additional sanction on SWBT for its failure to produce certain information and documents during discovery); see

Commissioner Walsh made clear that the PUCT was also not going to allow SWBT to profit from its delay tactics:

> Southwestern Bell's failure to comply with the discovery rules in [the Rhythms/Covad] arbitration delayed the ability of these companies to enter the market and [the PUCT's] ability to review commercial data to evaluate Southwestern Bell's wholesale provision of DSL capable loops. Southwestern Bell should not now benefit from having this critical requirement glossed over in the 271 application.

11/4/99 Open Mtg. Tr. at 26.[37]

Nor is SWBT's claim of "no harm no foul" convincing. It is true that SWBT was forced to enter into interim agreements with Rhythms and Covad. But with regard to xDSL, the interim agreements contained only those rates, terms and conditions that the parties had already agreed upon during the underlying negotiation. See Chapman 11/19/99 Aff., Exhibit G, § 5.1 & Exhibit H, § 5.1. They expressly excepted those issues that had been presented to the arbitrators for resolution. Id. As a result, the interim agreements did not alleviate the delay occasioned by SWBT's discovery abuses.

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also PUCT News Release, "SWBT To Pay $846,000 Penalty: PUC Orders SWBT to Take Remedial Action" (Sept. 24, 1999) <www.puc.state.tx.us/nrelease/1999/092499.cfm>.

[37] See also 11/4/99 Open Mtg. Tr. at 223 ("we have not had testing of xDSL. [The PUCT] do[es] not have enough commercial volume to know what is going on with xDSL. We don't have consistent data on this, and there has been some slow down because of the arbitration involved with DSL.") (remarks of Commissioner Walsh).

The importance of ensuring that no carrier be given an artificial advantage (or allowed to retain an existing advantage) in offering advanced services cannot be overstated. As Commissioner Walsh stated: "as critical as [xDSL] service is and as high the likelihood that the market could be locked up by being able to bundle this service with everything else before other carriers can get access to providing this service, too, to me, is the greatest danger of irreparable harm to the market in the state of Texas." 11/4/99 Open Mtg. Tr. at 27. Fundamental fairness dictates that SWBT's xDSL offerings be tested against the full-strength parity requirements of the Act, not some watered down version. SWBT has not met that standard.

B. SWBT Does Not Provide Coordinated Cutovers In A Manner That Allows An Efficient Competitor To Compete.

This Commission has recognized that "[t]he ability of a BOC to provision working, trouble-free loops through hot cuts is of critical importance in view of the substantial risk that a defective cut will result in end-user customers experiencing service disruptions that continue for more than a brief period." New York Order ¶ 299. In ruling on Bell Atlantic's compliance with this checklist item in New York, the Commission examined the percentage of on-time hot cut performance as well as the quality of the unbundled loops provisioned through those hot cuts. Id. ¶¶ 299-303. The Commission concluded that Bell Atlantic's record

of "on-time hot cut performance at rates at or above 90%,[38] in combination with . . . fewer than five percent of hot cuts result[ing] in service outages and . . . fewer than two percent of hot cut lines . . . report[ing] installation troubles, [was] sufficient to establish compliance with the competitive checklist." Id. ¶ 309. SWBT has failed to meet even these generous benchmarks.

In the New York Order, the Commission typically relied on reconciled data when individual parties' data revealed inconsistencies. See, e.g., id. ¶ 302 (relying on NYPSC reconciled data for hot cut service outage data). Having experienced similar problems with data, the PUCT requested that SWBT and AT&T "investigate and reconcile data related to service outages that occurred during the [hot cut] provisioning process for UNE-L and UNE-L with LNP for AT&T Local Services (TCG)." Van de Water/Royer 12/16/99 Jt. Aff. at 3. As of December 16, 1999, these service outages were not captured in a performance measurement. Id. Accordingly, the results of that reconciliation are the only agreed-upon data on hot cut service outages in the Texas record.

The reconciliation process "involved reviewing AT&T and SWBT data and operations centers log notes for coordinated cutovers

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[38] "On-time" varied from one to eight hours, depending on the number of lines involved. New York Order ¶ 292.

that were identified by each company as experiencing an unexpected outage during the provisioning process." Id. "Based on a joint assessment of the data and logs, these misses were attributed to either AT&T, SWBT or to a category labeled 'Unreconciled or End User Caused.'" Id. Where the records were unclear or the parties did not agree as to who had caused the outage, "the results were categorized as 'Unreconciled.'" Id. at 3-4. The joint affiants appended a summary of their reconciled results, which reveals the following:

Coordinated Hot Cut Outages (1999)
(% of AT&T/TCG Loop with LNP)

Month	AT&T Caused	SWBT Caused	Unreconciled	Total
August	1.0% orders 1.2% lines	5.1% orders 4.4% lines	3.4% orders 1.8% lines	9.5% orders 7.4% lines
September	2.5% orders 2.7% lines	11.4% orders 7.1% lines	4.7% orders 2.1% lines	18.6% orders 11.9% lines
October	4.7% orders 2.8% lines	9.3% orders 6.6% lines	7.5% orders 3.5% lines	21.5% orders 12.9% lines

Van de Water/Royer 12/16/99 Jt. Aff., Attachment 1.

As the reconciled data reveals, the number of hot cuts resulting in service outages is far greater than the "minimally acceptable showing" of 5% or less articulated in the New York Order. New York Order ¶ 309. Here, SWBT's own data reveals that the percentage of orders (and lines) that experienced unexpected outages during the provisioning process is well above 5% for the

months of August (9.5% of orders; 7.4% of lines), September (18.6% of orders; 11.9% of lines), and October (21.5% of orders; 12.9% of lines). Moreover, as the chart reveals, SWBT was responsible (with one exception) for the majority of these outages. Largely in response to this reconciled data, the PUCT recently imposed another performance measurement (PM 114.1) that will measure the length of time it takes to physically complete the cutover, and is designed to track unexpected service outages. See Dysart Aff. ¶ 659; 12/16/99 Open Mtg. Tr. at 20-21, 54.[39] However, that change is not effective until the January 2000 performance measurements, and presumably data will not be available until late February, let alone reconciled. See Dysart Aff. ¶ 659; Conway Aff. ¶ 87. Accordingly, the only credible data available reveals an alarming percentage of unexpected service outages that SWBT has conceded it caused. See Van de Water/Royer 12/16/99 Jt. Aff., Attachment 1.

In addition, the PUCT directed SWBT and AT&T to reconcile data for hot cut PMs 58, 114, and 115. PM 58 measures the percentage of SWBT caused missed due dates for UNEs, including different types of loops such as the 5.0 and 8.0 dB loops, BRI loops, and DS1 loops. PM 114 tracks the percentage of coordinated hot cuts where SWBT prematurely disconnects the end user prior to the scheduled cutover time. PM 115 measures the

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[39] The reconciliation process also led to a number of process changes. Hoeven 12/14/99 Aff. at 3-7.

percentage of SWBT caused late cutovers, "specifically cutovers that begin in excess of 30 minutes after the frame due time." DeYoung/Huser 12/13/99 Jt. Aff. at 4-5. The reconciliation process was limited to those measurements tracking AT&T's UNE loop orders using the coordinated hot cut process. Id. at 5. As with the service outage data discussed above, the parties met and jointly assigned misses to either AT&T, SWBT, or to an "Unreconciled" category. Id. The resulting data revealed significant SWBT caused missed due dates for PM 58:

PM 58 % SWBT Caused Missed Due Dates (1999)
(% of AT&T/TCG 5.0 and 8.0 dB Loops with LNP)[40]

Month	AT&T Caused	SWBT Caused	Unreconciled	Total
August	2.2% 5dB ckts 0% 8dB orders	1.6% 5dB ckts 0.4% 8dB orders	0% 5dB ckts 1.9% 8dB orders	3.8% 5dB ckts 2.2% 8dB orders
September	0% 5dB ckts 0% 8dB orders	12.0% 5dB ckts 0.6% 8dB orders	0% 5dB ckts 0.9% 8dB orders	12.0% 5dB ckts 1.6% 8dB orders

DeYoung/Huser 12/13/99 Jt. Aff., Attachment 7 at 20.

SWBT argues that these results are unreliable because of the small sample size. See Dysart 12/14/99 Aff. ¶ 3. Because individual CLEC data is proprietary, Sprint is unable to assess SWBT's claim. Sprint notes, however, that the data for other CLECs' hot cut loop orders has not been reconciled. Again,

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40 5 dB loops are reported as a percentage of circuits, while 8 dB loops are reported as a percentage of orders. See DeYoung/Huser 12/13/99 Jt. Aff., Attachment 7 at 20.

because Sprint is not aware of how many CLECs ordered 5.0 dB loops or how many of those types of loops each CLEC ordered, Sprint is unable to calculate the overall effect if each CLEC were to experience the same proportional increase in its SWBT caused misses that AT&T did upon reconciliation. Sprint further notes, however, that in the Dallas/Ft. Worth area from August to September, when the percentage of SWBT caused missed due dates for 5.0 dB loops was skyrocketing from 1.6% to 12.0% for AT&T orders, the aggregate number of orders for those loops was decreasing. If SWBT's provisioning abilities are scaleable, one would expect the percentage of SWBT caused missed due dates to at least remain consistent, if not decrease. Under no conceivable circumstances, assuming that SWBT is provisioning CLECs at parity, would one expect a decrease in the volume of orders to lead to an increase in the percentage of missed due dates.[41]

As noted, the parties also reconciled data for PM 114 and PM 115. While the data for PM 114 (premature hot cuts) remained

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[41] In addition to problems in the Dallas/Ft. Worth area, SWBT's performance reports also indicate an inordinate and statistically significant lack of parity for SWBT caused missed due dates for 8.0 dB loops requiring no field work (PM 58-02) in South Texas. SWBT has reported discriminatory provisioning for the last four months (assuming more than 30 data points in November, historically, a safe assumption). SWBT caused missed due dates for CLECs 3.6% of the time in August, 2.2% of the time in September, 4.3% of the time in October, and 1.8% of the time in November. See Dysart Aff., Attachment B at 292, Attachment R. In comparison, for the same period, SWBT experienced missed due dates a fraction (.2%) of the time. Id.

largely unchanged, the data for PM 115 (percentage of SWBT delayed coordinated hot cuts) was more troubling:

PM 115 % SWBT Delayed Coordinated Hot Cuts (1999)
(% of AT&T/TCG Loops with LNP)

Month	AT&T Caused	SWBT Caused	Unreconciled	Total
August	1.0% cutovers	3.9% cutovers	2.9% cutovers	7.7% cutovers
September	1.0% cutovers	4.0% cutovers	1.8% cutovers	6.8% cutovers

DeYoung/Huser 12/13/99 Jt. Aff., Attachment 7 at 13.

Again, reconciliation of the data resulted in a significant increase in the number of delays identified as being SWBT caused. See id. at 7. In absolute terms, the number of SWBT caused delays originally reported for August and September was 5 and 1, respectively. Id. After reconciliation, the numbers for each month rose to 28. Id.

SWBT's self-reported data on percentage of trouble reports within 30 days of loop installation is also unsatisfactory.[42] In October, SWBT failed this measurement, PM 59, for 8.0 dB loops in Central/West Texas, where 7.0% of CLECs' lines experienced trouble within 30 days (versus 3.3% for SWBT), Dallas/Ft. Worth, where 4.4% of CLECs' lines experienced trouble (versus 2.9% for SWBT), and Houston, where 6.1% of CLECs' lines experienced

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[42] The volume of PM 59 orders for the various loops matches the volume for PM 58 orders, with one exception. That exception occurs for 8.0 dB loops, for which PM 58 appears to be a subset (ranging from 18-38%) of PM 59 orders. See id., Attachment B at 305-312.

trouble (versus 3.5% for SWBT). See Dysart Aff., Attachment B at 305-07.

While SWBT's performance for 8.0 dB loops generally improved in November,[43] its performance for other types of loops remained sporadic or worsened. For example, in South Texas, 11.1% of CLECs' customers reported trouble on new installations of 5.0 dB loops in November, versus 1.6% for SWBT. See id., Attachment R. SWBT had experienced similar problems with 5.0 dB loops in earlier months elsewhere. See id., Attachment B at 305. In particular, SWBT failed to deliver equal quality loops to CLECs in Central/West Texas for both August (9.4% trouble for CLECs versus 1.9% for SWBT) and September (12.5% versus 2%). See id. In addition, SWBT's record on Basic Rate ISDN (or "BRI") loops worsened. In November, 29.1% of new BRI loop installations experienced trouble within 30 days in Central/West Texas (versus 3.5% for SWBT); 13.8% in Dallas/Ft. Worth (versus 5.5% for SWBT); and 14.7% in Houston (versus 6.5% for SWBT). See id., Attachment R. Clearly, these numbers are far higher than the 2% of hot cut lines that reported trouble in New York.

Other troubling hot cut issues also remain unresolved. For example, although SWBT has more recently "introduced the Frame Due Time ("FDT") and 10-digit trigger processes for [hot cut]

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[43] SWBT's performance in Houston still lagged, with CLECs' customers reporting trouble on 5.9% of their lines within 30 days of installation compared to 3.5% of SWBT's customers. See id., Attachment R.

conversions," see Br. at 98 n.50, the performance of this new hot cut process is not currently being tracked and will not be addressed until the PUCT conducts its six-month review in April. 12/16/99 Open Mtg. Tr. at 21, 54.

No doubt SWBT will try, and may partially succeed, in explaining away unfavorable data as it has done elsewhere, perhaps by identifying and excluding what it classifies as data outliers, or by arguing that the number of data points is insufficient, or by pointing out that it actually complies once the critical z-factor is considered. The fact remains, however, that the results of the data reconciliation process call into question the credibility of SWBT's self-reported performance data. Without confidence in the data, the Commission cannot be sure that SWBT is not discriminating against its competitors. Nor does the reconciled data give the Commission much confidence that SWBT is coordinating hot cuts in a nondiscriminatory fashion or with equal quality loops. Contrary to its claims, SWBT has not met the "minimally acceptable showing" required in New York.

C. SWBT's Application Is Defective Because SWBT Has Refused To Comply With Its Obligation, Effective During The Pendency Of This Application, To Provide Line Sharing.

On numerous occasions, the Commission has required applicants to comply with rules that become effective during the

pendency of their applications.[44] While SWBT has taken steps to comply with the Commission's UNE Remand Order, it has failed to take any affirmative steps to comply with the Line Sharing Order, which becomes effective next week.[45] SWBT must demonstrate compliance with these rules before its application can be granted.

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[44] Because processing of a pending application, such as SWBT's, is not final, the Commission has found it appropriate to apply rule changes to the application. See, e.g., Application of Schuylkill Mobile Phone, Inc. for Authority to Operate a New Two-Way Mobile Facility on Frequency 454.025 MHz Under Call Sign KNLM621 at Selingsgrove, Pennsylvania, File No. 20141-CD-P/L-94, 1999 FCC LEXIS 5983, ¶ 3 (PRB, CWD, WTB Nov. 24, 1999); Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, 12 FCC Rcd. 10943, ¶ 206 (1997) ("Part 90 Rulemaking"); Public Mobile Services Lottery for Selection of Licenses for 931 MHz Paging Channels in the Greater New York City Metropolitan Area, 12 FCC Rcd. 3027, ¶ 8 & n.15 (WTB 1997); Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, 9 FCC Rcd. 6513, ¶ 100 (1994).

The federal courts have repeatedly upheld the Commission's authority to apply new rules to pending applications. See, e.g., Part 90 Rulemaking ¶ 206 ("It is well settled that the Commission may apply new rules to pending applications.") (citing United States v. Storer Broad., 351 U.S. 192, 197 (1956); Hispanic Info. & Telecomms. Network, Inc. v. FCC, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989); Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1987)).

[45] See Line Sharing Order ¶ 161 (in spite of the need for ILEC OSS modifications, the Commission ruled that "there may be interim measures that will allow competitive carriers to begin obtaining some form of access to this [UNE] even before 180 days"; as a result, the Commission held that its rules regarding line sharing will become effective next week, 30 days after publication in the Federal Register).

SWBT fails to comply with the Commission's Line Sharing Order in at least two key respects. First, it has no contractual obligation to provide line sharing. Second, to Sprint's knowledge, SWBT has not implemented the Commission's directive that SWBT dismantle its discriminatory SFS binder group management system.

Although SWBT provides line sharing for its own retail xDSL services, SWBT has not provided CLECs with line sharing.[46] Despite the Commission's exhortation that ILECs "amend their interconnection agreements to provide for line sharing as soon as possible," see Line Sharing Order, Executive Summary, SWBT has made no effort to offer binding commitments with regard to line sharing. As noted, this stands in sharp contrast to SWBT's contractual amendment that legally commits it to comply with those provisions of the Commission's UNE Remand Order that will become effective during the pendency of this application.

Rather than offer concrete commitments, SWBT pays lip service to the Commission's order by stating that SWBT is "taking timely steps to be in compliance with this requirement." Br. at 44.[47] In addition, SWBT again attempts to rely upon the

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[46] See Comments of Covad Regarding DSL OSS Data Requested During the 11/4/99 Open Mtg. at 10 (PUCT Dec. 14, 1999) ("Covad 12/14/99 Comments"); see also Geis 11/22/99 Aff. ¶¶ 32-34.

[47] Perhaps more worrisome, SWBT next plants the seeds of a "technical infeasibility" claim, noting that "no incumbent LEC has yet developed the means to implement [line sharing]." Br. at 44.

conditions approved in the SBC/Ameritech Order for compliance. As noted earlier, the SBC/Ameritech conditions were designed to counteract the anticompetitive effects of the merger, not to pry open its local markets. Accordingly, such reliance is patently inappropriate.

Moreover, even if SWBT were allowed to rely on the SBC/Ameritech conditions for compliance with Section 271, its commitments in that docket still fall far short of the mark. SWBT's "surrogate line sharing" is not an acceptable substitute for physical line sharing.[48] The record reflects this fact. As Covad's witness explained below, "instead of using the existing voice loop already provisioned to the customer premises, [under the surrogate arrangement] CLECs must incur the additional non-recurring and recurring expense of provisioning a second loop, allowing SWBT to price its service much lower than its competitors." Covad 12/14/99 Comments at 10 (citing Scott Aff. ¶ 8). In addition, CLECs often face higher non-recurring loop conditioning charges because the SBC/Ameritech surrogate arrangement forces CLECs to use a second, typically "dirtier," loop to provision data services, instead of the existing, and typically "cleaner," voice loop that SWBT is able to use. See 11/4/99 Open Mtg. Tr. at 228-230 (remarks of staff person Judge

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[48] The Commission's Line Sharing Order discusses at length the reasons that relying on a second line, rather than line sharing, is often "not possible as a practical, operational or economic matter." See Line Sharing Order ¶¶ 38-42.

Farroba); see also Line Sharing Order ¶¶ 215-16. Finally, as Covad demonstrates, surrogate line sharing arrangements are not provisioned at parity with SWBT's retail services, allowing SWBT to provision its data services faster. Covad 12/14/99 Comments at 10.

Second, to Sprint's knowledge, SWBT has failed to dismantle its discriminatory binder group management system, SFS, which the Commission ordered SWBT to do by next Monday, February 7. See Line Sharing Order ¶¶ 215-16, 231. As noted, SWBT's xDSL attachment to the T2A expressly allows SWBT to utilize SFS. See T2A, Attachment 25 § 8.1. Thus, even if SWBT is currently dismantling SFS, it has failed to ensure that the terms of the T2A comply with the Line Sharing Order. See Line Sharing Order ¶¶ 215-16, 231.

SWBT has a duty to demonstrate that it is in compliance with legal requirements that become effective during the pendency of its application. It has not done so. While this issue can be easily remedied, SWBT's application cannot be found in compliance absent a legally enforceable commitment to provide line sharing. See Second Louisiana Order ¶ 54; Michigan Order ¶ 55.

III. SWBT FAILS TO PROVIDE NONDISCRIMINATORY ACCESS TO INTERCONNECTION TRUNKS ON A CONSISTENT BASIS.

Section 271(c)(2)(B)(i) of the 1996 Act requires a Section 271 applicant to provide interconnection trunks to competitors "at least equal in quality to that provided by the local exchange

carrier to itself" and more generally on rates, terms and conditions that are just, reasonable and nondiscriminatory. See New York Order ¶¶ 63-64. There is no more basic input for a CLEC than interconnection trunks to allow the CLEC's customers to exchange traffic with the ILEC's customers. Service problems experienced on interconnection trunks are acutely service-affecting and must be taken very seriously in the context of a Section 271 proceeding.

The relevant performance data reveals problems SWBT is experiencing with most aspects of providing interconnection trunks to CLECs. For example, SWBT has not consistently met the requisite benchmarks for several trunking performance measurements in two of the four geographic areas in Texas for which SWBT provides data. In Houston, SWBT has failed to meet the benchmark for SWBT end office to CLEC end office trunk blockage (PM 70.01) three out of the last five months -- July, August, and September. Dysart Aff., Attachment B at 487.[49] Moreover, SWBT has experienced more than 3% common transport trunk blockage in South Texas for four of the last six months of the reported data (PM 71.01). Id. at 488, Attachment R. While SWBT has indicated that it has implemented remedies to solve the trunk blockage problems in Houston and South Texas, see Dysart

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[49] The Commission has held that trunk blockage is an indicator of whether an ILEC is providing interconnection "equal in quality" to that which it provides itself. Second Louisiana Order ¶ 77.

Aff. ¶¶ 552, 555, additional data is needed to demonstrate that problems actually have been resolved in Houston. This is true especially given that, as discussed more fully below, SWBT is out of parity in the installation of trunks for CLECs for the months of September, October, and November in Houston. See id., Attachment B at 495, Attachment R. In addition, the data for South Texas has not shown steady improvement, as SWBT only met the benchmark for one month in the last nine months (since March 1999). Id., Attachment B at 488, Attachment R. Indeed, despite its claims that it had solved the trunk blockage problem in South Texas and met the benchmark in October in addition to September, Dysart Aff. ¶ 555, SWBT actually did not meet the benchmark for October, and it also failed to meet it in November.

In addition, SWBT missed more due dates for installation of trunks for CLECs than for itself in Houston during September, October, and November (PM 73-01). See id., Attachment B at 495, Attachment R.[50] In September, SWBT missed 10.7% of the CLEC due dates compared to only 6.9% of its own due dates. In October, SWBT missed 9.8% of the CLEC due dates and 5.1% of its own. In November, SWBT missed 15.5% of the CLEC installation due dates compared to only 0.6% of its own. See id. Based on these

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[50] The Commission has held that where an ILEC does not provide trunk installation for CLECs at parity with the service it provides for its own interoffice trunks, a BOC is not providing interconnection on terms and conditions that are "just, reasonable, and nondiscriminatory." See New York Order ¶ 65.

numbers, it is evident that SWBT has failed to meet the nondiscrimination standard for trunk installation in Houston. Indeed, SWBT's installation performance is growing worse in Houston, not better.

SWBT further promises that it can deliver up to 288 trunks per day per CLEC in each major market area. See Samson/Madden 12/14/99 Jt. Aff. ¶ 5. However, SWBT has not demonstrated that it can actually perform at that level. According to the data for October in Houston, SWBT had 13,291 trunks to install (429 trunks per day). Dysart Aff., Attachment B at 495. Of those installations, it missed the due date for the installation of 1,296 trunks. At that installation rate, SWBT cannot possibly meet two CLECs' requests for 288 trunks per day in the Houston area. In the Dallas/Ft. Worth region, SWBT had 4,343 trunks to install (140 trunks per day). Id. at 494. It missed the due date for 994 of those trunks. At that rate, SWBT cannot possibly meet one CLEC's request for 288 trunks per day in the Dallas/Ft. Worth area. Thus, the commitment that SWBT will provide 288 trunks per day per CLEC in each major market area is simply not credible.

IV. GRANT OF SWBT'S APPLICATION AT THIS TIME IS INCONSISTENT WITH THE PUBLIC INTEREST.

The record is unequivocal that significant entry barriers remain in Texas. While the PUCT must be commended for its efforts to require SWBT to make substantial progress, SWBT is

still not complying with the checklist, and must do so before it is given interLATA authority. To allow BOC entry prematurely would forego the anticipated benefits that flow from local telephone competition, and would substantially diminish if not eradicate the consumer benefits of today's competitive long distance markets.

The Commission has previously recognized that its duty to evaluate whether an application is in the public interest is a duty distinct from and independent of the other preconditions to 271 relief:

> In making our public interest assessment, we cannot conclude that compliance with the checklist alone is sufficient to open a BOC's local telecommunications markets to competition. If we were to adopt such a conclusion, BOC entry into the in-region interLATA services market would always be consistent with the public interest requirement whenever a BOC has implemented the competitive checklist. Such an approach would effectively read the public interest requirement out of the statute, contrary to the plain language of the section 271, basic principles of statutory construction, and sound public policy.[51]

Thus, the Commission has determined that its public interest evaluation must include an assessment of the state of local competition throughout the state and its prospects for future growth, the threatened effects on long distance markets, the likelihood that backsliding will not occur, and other factors.

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[51] Michigan Order ¶ 389. See New York Order ¶ 423 ("the public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination").

As most recently articulated in the New York Order, the Commission explained that it may "review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest" and consider "whether [the Commission has] sufficient assurance that markets will remain open after grant of the application." New York Order ¶ 423. The likely effects on new markets, most especially on the markets for advanced services, are appropriate parts of the public interest evaluation. SWBT now controls nearly one-third of the nation's access lines, and its incentives and opportunities for discrimination in local and long distance markets have grown substantially as a result of its acquisition of a larger local footprint. As discussed in detail below, the record requires the conclusion that the public interest would be disserved by a grant of the application at this time.

A. The Effects Of The SBC/Ameritech Merger Must Be Factored Into The Public Interest Inquiry.

The 1996 Act in general, and Section 271 specifically, reflect the legislative judgment that the benefits of Bell Company entry into long distance, under some conditions, will be worth the risk of the competitive harm. Congress delegated to the Commission the responsibility to assess those conditions, to undertake a cost/benefit analysis on a state-by-state basis, and to include among the "public interest" parameters of that

analysis the openness and competitiveness of local markets as well as the potential effects on long distance markets. In balancing these concerns, the Commission must now factor into the mix a critical factual part of the economic landscape: the larger "footprint" SWBT now controls. When the Commission considered the first 271 application in January 1997, there were eight large ILECs and no one of them controlled more than 14% of the access lines. See Statistics of Communications Common Carriers, Table 2.1 (1996/1997). Today, there are only five[52] and SWBT controls approximately 30% of the nation's access lines. The dangers of ratepayer and competitive harm are likely to increase materially under these new conditions. See generally, SBC/Ameritech Order ¶¶ 186-254. These harms predictably run to the markets for local services, long distance services, and for advanced services, see id., and are an essential part of the Commission's public interest analysis here.

The Commission has explicitly recognized that the increased size of SWBT poses dangers both within the newly enlarged SWBT region as well as throughout the U.S. market: "The merger will substantially reduce the Commission's ability to implement the market-opening requirements of the 1996 Act by comparative practice oversight methods." SBC/Ameritech Order ¶ 5.[53] The

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[52] The application of Bell Atlantic and GTE to further reduce that number to four is pending.

[53] One key way in which the Commission has determined whether common carriers are meeting their statutory obligations is

SBC/Ameritech Order also recognized that the incentives of RBOCs to engage in exclusionary conduct increase substantially as the size of their monopoly service areas increases: "Specifically, we conclude that the combined entity likely will discriminate to a greater extent against termination of interexchange calls by competing providers in the combined region, as well as against competitive LECs seeking to provide local exchange services in

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to compare the varying practices of different carriers. Benchmarking is a significant regulatory tool that will be severely hampered by the recent BOC mergers. See SBC/Ameritech Order ¶¶ 101-185. Benchmarks aid the Commission in overcoming the substantial asymmetry in information availability that otherwise impedes effective regulation. Benchmarking allows the Commission to better assess what practices are technically feasible, to ascertain whether rates are reasonable, and to scrutinize unusually poor performance and remedy it. As the number of comparable carriers decreases through merger, however, the Commission's ability to establish and rely on benchmarks declines. And as regulatory effectiveness diminishes, the risk of detection of misconduct decreases, making engaging in such misconduct less costly and therefore more likely.

The Commission also recognized the impact that mergers have on its regulatory ability in its Bell Atlantic/NYNEX Order. Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries, 12 FCC Rcd. 19985 (1997). In that decision, the Commission noted its concern that the declining number of large ILECs will adversely affect its

> ability to carry out properly its responsibilities to ensure just and reasonable rates, to constrain market power in the absence of competition, and to ensure the fair development of competition that can lead to deregulation . . . .

Id. ¶ 16. In SBC/Ameritech, the FCC expressly observed that the scale of SBC will "far exceed the scale of the Bell Atlantic/NYNEX combined entity." SBC/Ameritech Order ¶ 228.

the combined region." Id. ¶ 188. And the Commission reached the same conclusion with respect to advanced services: "The merger increases, from pre-existing substantial levels, the ability and incentive of the merged entity to discriminate against the providers of advanced services." Id. ¶ 207.[54]

Thus, SWBT's control of one-third of the nation's access lines constitutes a "special circumstance" and context for evaluating its Section 271 applications: premature interLATA relief will produce even more serious anticompetitive effects on new entrants into local telephony, will have an even greater adverse effect on competition between SWBT and IXCs in long distance markets, and will further delay and potentially foreclose new innovative services and/or combinations of services that threaten the BOC monopoly.

Remarkably (perhaps even tellingly), the expert testimony sponsored by SWBT in its application makes no mention whatsoever of the Commission's unambiguous endorsement and adoption of the "big footprint" analysis.

The conditions imposed on SWBT as a result of the SBC/Ameritech Order allowing the merger cannot be said to have

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[54] Discrimination practiced by one ILEC in one market therefore creates anticompetitive spillover benefits for other ILECs controlling other local markets. The merger increases the extent to which this effect becomes internalized, because it increases the number of local markets under the control of the merged entity. Thus, the larger the ILEC "investing" in discrimination the more fully it is able to appropriate the gains from its "investment." See id. ¶¶ 190-194.

neutralized these problems. The Commission repeatedly stated that the conditions were not to be used to satisfy or displace the RBOC's obligation under Sections 251, 252 or 271 of the Act. Id. ¶ 511 ("the conditions that we adopt today are in no way to intended to define what is required under, for example, 251 or 271, and SBC/Ameritech's compliance with these conditions does not signify that it will satisfy its nondiscrimination obligations under the Act or Commission rules").[55] The Order itself expressed doubt about the efficacy of even the agency's best regulatory efforts: "Although the Commission issues rules to prevent discrimination, and will continue to do so, it is impossible for the Commission to foresee every possible type of discrimination, especially with evolving technologies." Id. ¶ 206. Further, SWBT's proffer of conditions, in the Commission's view, simply allowed the agency to find the merger to be in the public interest rather than to specifically solve the anticompetitive effects of the transaction. Many of the conditions did not even address competition, but rather such distributional equities as services to low-income and rural subscribers. The Commission in fact stated:

> We doubt that any set of conditions could substitute fully for the loss of one of the few remaining major incumbent LEC benchmarks. The harm from [the loss of]

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[55] The Order expressly provided that the expiration of a merger condition could not be used in the public interest evaluation of an SWBT 271 application. SBC/Ameritech Order, Appendix C at 72. A fortiori, the existence of a condition prior to its expiration must be deemed equally irrelevant.